Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Rulemaking to Amend Parts 1, 2 , 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	CC Docket No. 92-297
And	
Suite 12 Group Petition for Pioneer's Preference	PP 22

To: The Commission

NYNEX COMMENTS

NYNEX Corporation, on behalf of its subsidiaries (collectively "NYNEX"), hereby submits its Comments in response to the Third Notice of Proposed Rulemaking and Supplemental Tentative Decision ("Third NPRM"), released July 28, 1995, in the above-captioned proceedings.[1]

I. INTRODUCTION

NYNEX commends the Commission for its open-ended and inclusive approach to determining the best use of the spectrum available in the 27.5-29.5 GHz Frequency Band. This approach will enable a competitive market structure to determine, over

[1]NYNEX is actively evaluating the capabilities of LMDS technology to meet customer needs. NYNEX participated in the Negotiated Rulemaking Committee earlier instituted in Docket 92-297, and is conducting experiments at 28 GHz pursuant to 47 C.F.R. 5. 202(a) (File # 4253-EX-MR-94).

time, the type and scope of services that will best serve the public interest. Thus, NYNEX supports the Commission's proposals: to include all potential service providers as prospective acquirers of spectrum for development;[2] to refrain from specifying particular uses for delivery;[3] and to use a competitive-bidding (auction) process to ensure that the public's highest valued uses are pursued.[4] Indeed, even where it appears that spectrum must be split among the diverse Local Multipoint Distribution Service ("LMDS"), Fixed Satellite Service ("FSS") and Mobile Satellite Service ("MSS") technologies, the Commission has sought to leave the broadest latitude for actual provisioning to the marketplace. The Commission's pro-competitive reasoning in these areas is well-considered and need not be repeated here.

The subject of these comments, however, are provisions in the Third NPRM that are inimical to the open-ended, inclusive approach that the Commission is pursuing. Unless these provisions are amended they will limit the prospects for a successful auction, and the subsequent market-driven rollout of the most efficient technologies with the highest value services.

II. THE COMMISSION SHOULD PLACE A MINIMUM OF TECHNICAL CONSTRAINTS ON THE POTENTIAL SERVICE OFFERINGS

Last year the Commission undertook the very challenging task of exploring in this proceeding the potential for "band sharing" among three diverse services in the 27.5 - 29.5 GHz band. Recognizing that its efforts were made more complicated by the broad range of proposed services and differing levels of development of the LMDS, FSS and MSS technologies, the Commission established a LMDS/FSS

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[2]Third NPRM at paras. 97-108.

[3]Third NPRM at paras. 92-93. In keeping with this inclusive approach, the Commission should adopt the most flexible form of regulation under consideration (i.e., the "third option" described in para. 96). Such action would parallel the approach applicable to MDS (47 C.F.R. § 21.900).

[4]Third NPRM at paras. 129-133

28 GHz Negotiated Rulemaking Committee ("NRMC") to assist in the determination of bandwidth sharing.[5] While there was much technical information accumulated by the NRMC, it was unable to determine a technical solution for comprehensive bandwidth sharing.[6] Despite the requests of several participants (including NYNEX) to consider band splitting, the NRMC did not believe that it was chartered to do so. Accordingly, the Commission itself has undertaken in the Third NPRM to effect a fair balance of competing interests.[7] Although the resulting band segmentation plan is clearly a "second best" solution, NYNEX supports the overall fairness of this plan as a means to encourage service delivery through competition.

Having reluctantly determined to segment the bandwidth, the Commission recognizes that it should now take particular care that the rules it establishes not further restrain competitive forces beyond those restraints shown to be technically necessary.[8] Unfortunately, in the one area of proposed LMDS/MSS band sharing, the provisions of the Third NPRM place undue encumbrances on innovative uses of the band by favoring particular subsets of technologies and companies. Moreover, these provisions have not been shown to be technically necessary.

For example, all of the proposed rules for band sharing in the 29.1-29.25 GHz band, including the frequency coordination requirements and the limits in number and locations of MSS base stations, are unduly restricted to those positions advanced by CellularVision and Motorola in the NRMC (Proposed rule §21.1002(e)(2)). Clearly, it is poor policy to promulgate rules that restrict the number and location of MSS earth stations to those already identified by specific companies for their particular

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[5] Second Notice of Proposed Rulemaking, 9 FCC Rcd 1394 (1994).

[6] FCC, Report of the LMDS/FSS 28 GHz Negotiated Rulemaking Committee ("Report"), Docket 92 297, released September 23, 1994.

[7] Third NPRM at paras. 44-67.

[8] Id. at para. 118.

networks.[9] In addition, other geographic constraints are similarly arbitrary. These include such constraints as the 75-mile exclusion zones and the specification of particular ranges of MSA's. No record basis was established in the NRMC as to the requirements for these limitations. Each of these constraints are unduly detailed and restrictive for this stage of technology availability. Most importantly, they may preclude spectrum interest at auction and the development of viable service alternatives.

The same is true for the proposed restrictions on subscriber transmissions in the 29.1-29.25 GHz band. (Proposed rule § 25.257). These may have the unnecessary effect of limiting the feasibility of interactive, near-interactive or telephone services. The public interest in, and need for such services, should instead be determined by encouraging an open-ended market structure with minimal restrictions on subscriber transmissions.

The Commission has indicated that it intends to use an auction methodology to establish market-based levels of interest. Prior to this auction, the Commission should minimize its technical operational restraints upon spectrum utilization, and focus on the rules necessary for potential service providers to determine their economic positions.[10] As discussed below, establishing the minimal technical requirements for effective and efficient spectrum utilization and sharing should be the focus of an independent Technical Advisory Committee.

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[9] Similarly, the proposed rules for power reduction techniques steer prospective LMDS providers towards proprietary methods that are held under a patent by another provider (CellularVision), thus unnecessarily creating cost and entry hurdles to alternative providers fearful of costly royalty rights and the entanglement of intellectual property claims.

[10] For example, the Commission should add detail to its rules for determining the "attenuation exceeding clear air", including requirements for the accuracy of such measurements and the speed for implementing any correction resulting from these measurements. Details in rules of this type enable the informed assessment of a prospective bidder's economic interest.

III. THE COMMISSION SHOULD MAXIMIZE THE NUMBER OF SERVICE PROVIDERS

The Commission properly seeks to maximize the diversity of potential service offerings that could be provided employing this spectrum. It should further this competitive market approach by assuring itself that a maximum number of competitive providers are encouraged.

The Commission has sought comments on the size of the spectrum blocks it should consider licensing, proposing the consideration of one, two or three licensees.[11] In the earlier phases of this proceeding, it appeared that technological constraints required that all -- or substantially all -- of the available spectrum might be required by a single service provider to establish an LMDS service offering.[12] However, considerable information was developed in the NRMC which indicated that, with the advancement of digital technology, allotments of far less spectrum can be "channelized" into viable commercial operations.[13] In its ongoing dialogue with manufacturers, NYNEX has been advised that this technology is nearing production capability. The Commission has properly shown its interest in developing this information further.[14]

In fact, the Commission should establish the merits of these claims before it determines the size of the spectrum blocks it will make available for auction.[15] Specifically, there should be an affirmative bias towards auctioning spectrum in the smallest blocks that will generate commercial interest. Then, if an entity seeks a greater amount of spectrum, it should pursue the acquisition of multiple blocks

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[11] Third NPRM at paras. 78-79.

[12] Third NPRM at paras. 11-12.

[13] See, e.g., Section 2.1 General Descriptions of LMDS Systems, Report at p. 4 et seq.

[14] Id. at para. 78.

[15] Third NPRM at para. 79.

without depriving others of the opportunity to compete on a different basis.[16] In any event, no exclusive market authorization should be made, absent a complete understanding of the technological imperative for that competition-limiting condition.

The same principle should apply to CellularVision's pioneer preference.[17] The Commission has specifically requested comment on whether the technology and service "buildout" conditions of 47 C.F.R. §1.402(e) should be applied to this preference. In view of the technological advances which have been made since this pioneer's preference was awarded (January 1993), it would not appear appropriate to limit CellularVision to the older, less efficient "FM analog" technology on which the preference was established. By the same measure, the award should be for only that amount of spectrum necessary to efficiently operate an economically viable system. CellularVision's predecessor, Hye Crest Management, was granted a 5-year license to provide the requested 24-channel service using 1000 MHz with its pioneering technology.[18] Assuming a comparable efficiency in digital channelization to that used in MMDS, these same 24-channels could now be provided over 36 MHz. There is simply no good reason for the Commission to provide market exclusivity by "awarding" CellularVision the whole available spectrum.[19] This is also consistent with the initial award of "one of the frequency blocks" for its' preference area.[20]

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[16] Id. The Commission itself contemplated this competitive bidding plan by seeking comment on the "aggregation of licenses within the same geographic service area."

[17] Third NPRM at para. 73.

[18] In re Application of Hye Crest Management, Inc., 6 FCC Rcd 2nd 332 (1991) at paras. 3-6.

[19] It is noteworthy that the Commission specifically limited the license granted to CellularVision's successor, Hye Crest Management, to five years rather than the usual ten. Id. at para. 29. Thus, the Commission will be in a position next year to conform the license held for the New York PSMA. Third NPRM at para. 72.

[20] Notice of Proposed Rulemaking, Order, Tentative Decision and Order On Recommendation, 8 FCC Rcd 2nd 557, 566 (1993).

IV. THE COMMISSION SHOULD ESTABLISH AN INDEPENDENT TECHNICAL ADVISORY COMMITTEE TO MAXIMIZE PUBLIC BENEFIT

This proceeding involves the development of one of the largest contiguous spectrum segments available to the Commission. The Commission has properly determined to do so by encouraging competitive marketplace forces. As above, further technical fact-finding is needed to maximize the opportunity as to both the establishment of the minimal necessary rules for open-ended entry and the smallest spectrum blocks required for effective auction.

The Commission's effort to resolve these issues on the paper record created in response to the Third NPRM is laudable. However, it should consider referring that record, and as well as NRMC information and post-NRMC ex parte proposals, to an independent Technical Advisory Committee ("TAC") for further development.[21] By placing these issues with an independent entity of renowned technical expertise, like the National Institute of Science & Technology, the proliferation of unchallenged parochial presentations which followed the NRMC proceedings could be limited. Instead, a panel comprised of technical experts could sift through industry materials and answer factually the specific questions put by the Commission. Moreover, it could be expected to proceed quickly because, given the Commission's determination to split the bandwidth and to adopt an open-ended approach, the TAC does not need to make comparative value judgments.

It can be anticipated that some will decry this proposal as introducing further delay in this proceeding. In response, we observe that while it is important to begin the development of this opportunity as promptly as reasonably possible, it is more important to begin that development on the proper basis. The Commission will not get another opportunity to write on a "clean slate". Further, in view of the nascent stage of technology development, the uncertain impact of the World

[21] There is clear precedent for the establishment of an FCC Advisory Committee to resolve open technical issues or controversies. (See, e.g., FCC Advisory Committee on Advanced Television Service).

Radiocommunication Conference, the prospects of an auction, and the probability that service delivery thereafter will require substantial time in any event, it is unlikely that the resolution of these issues by the TAC will add measurable delay. In any event, it will be time well spent.

V. CONCLUSION

The Commission is taking the right steps in this proceeding to ensure that the large segment of spectrum at issue is put into public service via a marketplace-determined process. NYNEX believes this approach can be materially assisted by the proposals offered herein.

Respectfully submitted,

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and
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